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Searching for an Impartial Sentencer through Jury Selection in Capital Trials

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SEARCHING FOR AN IMPARTIAL SENTENCER THROUGH JURY SELECTION IN CAPITAL TRIALS

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Jury selection is perhaps the most important stage of any trial[1] and is especially important in capital trials where a jury recommends the sentence.[2] Capital trials routinely involve very brutal crimes where the defendant's guilt is virtually unassailable.[3] In these cases, the only serious undertaking for a jury is the determination of the appropriate sentence—life or death. The criminal justice system assumes that a jury which is impartial regarding the guilt or innocence of an accused can at the same time be biased as to the appropriate punishment for one convicted of murder. In light of overwhelming societal support for the death penalty,[4] the task of empaneling an impartial jury to determine the appropriate punishment for a person convicted of murder may be difficult, if not impossible. Nevertheless, defense lawyers must select qualified and competent jurors who are willing to sentence their clients to death,[5] and voir dire is the tool provided for accomplishing this goal.

This article offers several methods for selecting an impartial sentencing jury in a capital murder trial. Section I of the article briefly outlines

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1. Voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

2. *See, e.g.*, Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 341 (1979).

3. *Id.* at 345. This is not to suggest that even when there is little doubt that the defendant "did it," no legal questions exist regarding gradations of culpability that aggressive counsel must explore.

4. *Death Penalty Support Hits Record High*, Raleigh (N.C.) News and Observer, Dec. 4, 1988, at 23A, col. 1.

5. Jurors must be at least willing to consider invoking the death penalty if they are to determine a sentence which may potentially be death. See discussion of Witherspoon v. Illinois, 391 U.S. 510 (1968), *infra* notes 102-13 and 258-62 and accompanying text.

the sixth amendment right to an impartial jury in state criminal proceedings, the eighth amendment prohibition against cruel and unusual punishment, the role of the sentencer in a capital trial, and the constitutional doctrines arising from the sixth and eighth amendments and their special concern with the irrevocability of death as a punishment. Section II posits that jurors who harbor misconceptions about the parole eligibility of life-sentenced inmates are not eligible to pass sentence, and proposes that voir dire is a constitutionally mandated method to assure that the empaneled jury is impartial. Section III contends that jurors who are not able to give independent weight to relevant mitigating evidence offered by the defendant facing death are not eligible to pass sentence, and proposes that voir dire is a constitutionally mandated method to assure that the empaneled jury is impartial. Section IV briefly elucidates the constitutional implications of peremptory challenges, and suggests that a prosecutor's use of peremptory challenges to systematically exclude all jurors who express any misgivings about the imposition of the death penalty creates a biased jury. Section V concludes by reiterating the importance of jury selection in capital cases and urging that the empaneling of an impartial jury at a capital sentencing hearing is important as a matter of trial strategy within the adversary system and necessary as a matter of constitutional law.

I. CONSTITUTIONAL UNDERPINNINGS

A. The Sixth Amendment Right to an Impartial Jury

The sixth amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[6] Sixth amendment protections are extended to state criminal prosecutions through the fourteenth amendment's Due Process Clause.[7] Indeed, even before the guarantees of the sixth amendment were incorporated to govern state prosecutions, the Due Process Clause was held to require an impartial jury in a state criminal prosecution.[8]

Without doubt, no federal or state jurisdiction purports to allow the use of voir dire as a tool to select a jury more favorable to one side or the other. Rather, consistent with an adversary system of justice, the ration-

6. U.S. CONST. amend. VI.

7. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

8. Irvin v. Dowd, 366 U.S. 717, 772 (1961). Voir dire, which is primarily governed by state law, is used to enforce the federal constitutional right to an impartial jury. Turner v. Murray, 476 U.S. 28, 36-37 (1986); Wainwright v. Witt, 469 U.S. 412, 424 (1985); Ham v. South Carolina, 409 U.S. 524, 526-27 (1973).

ale for voir dire in most jurisdictions is two-fold: first and foremost, to obtain a petit jury which is impartial, able to apply the law fairly and to consider the evidence before it objectively and, second, to allow the parties to exercise their peremptory challenges intelligently.[9] When employed as a tool for the protection of the constitutional right to an impartial jury, the specific issue of whether to allow a particular question or line of questions is left to the discretion of the trial court.[10] Nevertheless, the United States Supreme Court has limited this discretion by holding that the sixth amendment, as well as the Due Process Clause of the fourteenth amendment, require a trial court to conduct voir dire on specific areas of prejudice when special circumstances attending a particular trial raise a constitutionally significant likelihood that, absent such questioning, the jury empaneled would not be impartial.[11]

This jurisprudence has developed both slowly and indirectly. The tentative examination of these specific areas of prejudice by the federal courts is, no doubt, rooted in traditional concerns about comity with the states. Nevertheless, this requirement is important to counsel's approach in seeking to impanel an impartial jury to pass sentence in a capital trial.

For the most part, the Court has addressed a defendant's constitutional right to question the bias of prospective jurors in the context of interracial crimes. In *Ham v. South Carolina*,[12] the United States Supreme Court addressed a claim that petitioner was denied the right to a fair and impartial jury under the sixth and fourteenth amendments when the trial court denied the request of petitioner's counsel to ask four specific questions addressing the bias of prospective jurors.[13] Two questions involved racial bias, a third involved bias against beards, and the fourth involved bias in favor of a police officer/witness who had made a television appearance shortly before the trial discussing drug problems.[14]

The petitioner, Gene Ham, was a young, black civil rights worker charged with possession of marijuana.[15] He was well known locally for

9. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). *See also* State v. Bracey, 303 N.C. 112, 119, 277 S.E.2d 390, 395 (1981).

10. Ham v. South Carolina, 409 U.S. 524, 527 (1973). There are important justifications for leaving the trial court with this discretion. For example, one of the critical determinations on the question of impartiality is the demeanor of the prospective juror, which can only be seen in the trial court. *See* Wainwright v. Witt, 469 U.S. 412, 425-26 (1985); Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984).

11. Ristaino v. Ross, 424 U.S. 589, 595 (1976).

12. 409 U.S. 524 (1973).

13. *Id.* at 525-26.

14. *Id.*

15. *Id.* at 524-25.

his civil rights work.[16] Ham claimed that he had been "framed" on the drug charge because the local police were "out to get him."[17] Ham's trial counsel requested the four voir dire questions respecting bias based on race, beards, and pre-trial publicity, but the trial court refused to make any of the requested inquiries.[18] Gene Ham was found guilty, and his conviction was affirmed by a divided South Carolina Supreme Court.[19] Relying on *Aldridge v. United States*,[20] the dissenting justices of the South Carolina Supreme Court stated that the federal Constitution mandated the requested inquiries as to racial prejudice.

Ham appealed to the United States Supreme Court, which initially implied that *Aldridge*, a case involving a federal rather than a state prosecution, did not necessarily apply to the states.[21] However, the Court agreed with the dissenting Justices of the South Carolina Supreme Court that in this case, the Due Process Clause of the fourteenth amendment required the trial judge to conduct voir dire on the question of racial prejudice.[22] In so holding, the Court reasoned that the decision in *Aldridge* was founded on "the essential demands of fairness," impliedly invoking the Due Process Clause.[23] Additionally, the Court noted that since the fourteenth amendment was principally adopted to cure invidious racial discrimination, the constitutional imperative of an impartial jury required voir dire on the question of racial discrimination when racial considerations were central to the defense.[24] While acknowledging a constitutional mandate, the Court did not require a particular form or number of questions and left the process of voir dire to the discretion of the trial court.

The Court's reasoning did not support requiring voir dire regarding bias against beards.[25] While the Court could not say "that prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case," it acknowledged its inability to distinguish constitutionally possible prejudice against beards from a host of other potential similar prejudices.[26] In contrast, the racial prejudice inquiry was founded in the Constitution and common law and created a

16. *Id.* at 525.
17. *Id.*
18. *Id.* at 526.
19. *Id.* at 524-25.
20. 283 U.S. 308 (1931).
21. *Ham*, 409 U.S. at 526-27.
22. *Id.* at 527.
23. *Id.* at 526-27.
24. *Id.*
25. *Id.* at 527-28.
26. *Id.*

constitutional distinction from other forms of prejudice.[27] Finally, the Court held that the record did not support the claim that pre-trial publicity biased the jury in this case.[28]

Just over three years later, the Court limited the scope of its decision in *Ham* in the non-capital case of *Ristaino v. Ross*.[29] Ross, a black man, was one of several persons charged with armed robbery, assault and battery with a dangerous weapon, and assault and battery with intent to murder a white security guard employed by Boston University.[30] The case was tried in Boston and trial counsel for the defendants suggested that the interracial nature of the crime required voir dire on the issue of racial prejudice.[31] Counsel indicated no special circumstances other than the interracial nature of the crime.[32] After inviting counsel to inform the court of any special circumstances that would militate in favor of conducting voir dire on racial prejudice,[33] the trial court declined to conduct voir dire on racial prejudice. The trial court asked prospective jurors to inform the court of any biases or prejudices they held.[34] Eighteen potential jurors were excused for cause, one on the grounds of racial prejudice.[35] On appeal, Ross preserved his sixth and fourteenth amendment claim that the denial of voir dire on racial prejudice denied him a fair and impartial jury.[36] This contention was rejected by the state courts.[37]

Ross then sought a writ of certiorari from the United States Supreme Court.[38] While Ross' petition was pending, *Ham* was decided. Ross' petition was granted, and the lower court's judgment was vacated and remanded for reconsideration in light of *Ham*.[39] After the judgment was re-affirmed,[40] Ross sought post-conviction relief in federal court.[41] The district court granted the writ of habeas corpus, holding that Ross

27. *Id.* at 528.
28. *Id.*
29. 424 U.S. 589 (1976).
30. *Id.* at 590.
31. *Id.* at 590-91.
32. *Id.* at 591.
33. *Id.* at 591-92.
34. *Id.* at 592.
35. *Id.* at 593.
36. *Id.* at 593-94.
37. Commonwealth v. Ross, 361 Mass. 665, 282 N.E.2d 70 (1972), *vacated sub nom.* Ross v. Massachusetts, 410 U.S. 901, *cert. denied*, 414 U.S. 1080 (1973).
38. Ross v. Ristaino, 388 F. Supp. 99, 100 (D. Mass.), *aff'd*, 508 F.2d 754 (1st Cir. 1974), *rev'd*, 424 U.S. 589 (1976).
39. Ross v. Massachusetts, 410 U.S. 901 (1973).
40. Commonwealth v. Ross, 363 Mass. 665, 296 N.E.2d 810 (1973).
41. Ross v. Ristaino, 388 F. Supp. 99 (D. Mass. 1974).

was denied a fair and impartial jury under *Ham*.[42] The First Circuit affirmed.[43]

The Supreme Court granted certiorari and reversed, observing that the First Circuit "read *Ham* too broadly."[44] The Court asserted that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him."[45]

While negating any suggestion that *Ham* required voir dire on racial prejudice whenever a trial involves a crime of interracial violence, the Court also concluded that voir dire on racial bias will be required when "there [is] a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as indifferent as they stand unsworne."[46] Whether voir dire questions specifically directed to racial prejudice are constitutionally required is assessed by considering all the circumstances surrounding the trial, including whether racial factors exist as in *Ham*.[47]

The *Ham/Ristaino* rule, requiring special circumstances to entitle a defendant to specific questions on voir dire, was applied in the capital context ten years later in *Turner v. Murray*.[48] Willie Turner, a black man, was charged with the murder of a white storekeeper.[49] At his trial, Turner's counsel submitted to the court a list of proposed voir dire questions.[50] One proposed question addressed whether Turner being black and his victim being white would prejudice prospective jurors against Turner or would affect their ability to render a fair and impartial verdict based solely on the evidence.[51] The trial court declined to ask the members of the venire this question.[52]

Turner was convicted, sentenced to death, and subsequently appealed his conviction and sentence to the state supreme court, claiming, inter alia, a denial of his sixth amendment right to a fair and impartial jury because the trial court refused to ask prospective jurors whether the interracial nature of the crime affected their judgment.[53] Turner's con-

42. *Id.* at 100.
43. Ross v. Ristaino, 508 F.2d 754, 757 (1st Cir. 1974).
44. *Ross*, 424 U.S. at 594.
45. *Id.* (citations omitted).
46. *Id.* at 596.
47. *Id.* at 597.
48. 476 U.S. 28 (1986).
49. *Id.* at 29.
50. *Id.* at 30.
51. *Id.*
52. *Id.* at 31.
53. *Id.*

viction was affirmed based on *Ristaino*.[54]

Turner sought collateral relief through issuance of a writ of habeas corpus in the federal courts, again raising a sixth amendment violation based on denial of voir dire on racial prejudice.[55] Both the United States District Court and the United States Court of Appeals for the Fourth Circuit rejected the claim.[56]

The United States Supreme Court reversed and remanded the case for the issuance of the writ insofar as Turner's death sentence was concerned.[57] The Court acknowledged the Fourth Circuit's correct reliance on the test articulated in *Ristaino* to decide whether particular inquiries on voir dire were required.[58] The Court distinguished *Ristaino*, however, noting that it was not a death penalty case.[59] The Court stated that "the [sentencing] jury [in a capital case] is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.' "[60] The Court reasoned that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."[61] The Court stated that given the finality of the death penalty, the risk that racial prejudice infected the capital sentencing proceeding is unacceptable when weighed against the ease with which that risk could be minimized.[62] Therefore, a plurality held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[63] This holding reached the death sentence because of the breadth of discretion afforded a sentencing jury under Virginia's capital-sentencing scheme. However, the holding did not affect Turner's conviction.[64] Hence, Justices Brennan and Marshall concurred in the result insofar as it affected Turner's sentence; they dissented from the plurality's decision insofar as it affirmed Turner's conviction.[65] *Turner* represents the

54. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied sub nom.* Turner v. Virginia, 451 U.S. 1011 (1981).

55. *Turner*, 476 U.S. at 32-33.

56. Turner v. Bass, 753 F.2d 342, 344 (4th Cir. 1985).

57. *Turner*, 476 U.S. at 37.

58. *Id.* at 33.

59. *Id.*

60. *Id.* at 33-34 (citing Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985)).

61. *Id.* at 35.

62. *Id.* at 35-36.

63. *Id.* at 36-37.

64. *Id.* at 37.

65. *Id.* at 38 (Brennan, J., concurring in part and dissenting in part); *id.* at 45 (Marshall, J., concurring in part and dissenting in part).

Court's most recent decision regarding the constitutional implications of voir dire where the likelihood of jury bias is significant.[66]

B. The Death Penalty and the Eighth Amendment Proscription Against Cruel and Unusual Punishment

The eighth amendment to the United States Constitution, as applied to the states by the Due Process Clause of the fourteenth amendment,[67] "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[68] In 1972, the Supreme Court of the United States first heard and adjudicated a direct challenge to the death penalty as violative of the eighth and fourteenth amendments.[69] In *Furman v. Georgia*,[70] the Court issued a short per curiam opinion holding Furman's death sentence unconstitutional.[71] The primary impact of *Furman* was to invalidate virtually all pending death sentences.[72] Beyond that there was little agreement. All nine Justices, five concurring in and four dissenting from the Court's opinion, wrote separately to express their views about the constitutionality of the death penalty.[73] In short, the five concurring opinions expressed the view that the eighth amendment, at the very least, prohibited the arbitrary and capricious imposition of the death penalty. *Furman* ultimately came to stand for the proposition that because of its unique finality and severity, the death penalty could be imposed only when a legislature made a positive determination that capital punishment served a valid penological justification.[74] Further, the death penalty had to be administered within meaningful sentencing guidelines for the jurors who made the grave decision whether a particular human being would live or die. Many observers felt that the decision in *Furman* was the end of capital punishment in America.[75]

In the wake of *Furman*, however, a sizable majority of states reen-

66. *Turner v. Murray* was decided April 30, 1986. 476 U.S. 28 (1986).

67. Louisiana v. Resweber, 329 U.S. 459 (1947).

68. Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Weems v. United States, 217 U.S. 349, 378 (1910) (The amendment's meaning "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.").

69. Furman v. Georgia, 408 U.S. 238 (1972).

70. 408 U.S. 238 (1972).

71. *Id.* at 239-40.

72. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 38 (1987).

73. *Furman*, 408 U.S. at 240.

74. Gregg v. Georgia, 428 U.S. 153, 183 (1976). See also McCleskey v. Kemp, 481 U.S. 279, 301 (1987), where the Court comments on *Furman* and *Gregg* noting "that any punishment might be unconstitutionally severe if inflicted without penological justification."

75. *See, e.g.*, M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

acted death penalty statutes.[76] In examining five different post-*Furman* death penalty statutes, the Supreme Court held that the death penalty is not per se cruel and unusual punishment in violation of the eighth and fourteenth amendments.[77] Instead, the Court developed both substantive and procedural doctrines through which the death penalty could be constitutionally administered.[78]

These five cases evaluated the means by which Georgia, Florida, North Carolina, Louisiana and Texas adjusted to *Furman*'s prohibition against standardless sentencing. Two states, North Carolina[79] and Louisiana,[80] adopted a mandatory death penalty for capital crimes. The Court rejected these schemes because they only masked the problem of arbitrariness and lack of standards in capital sentencing.[81] Such schemes allowed juries to "nullify" the death penalty by acquitting, or by convicting of lesser included offenses, those defendants that the juries wished to spare.[82] Further, and more important to the development of constitutional-capital jurisprudence, the Court concluded that a mandatory death penalty is unconstitutional if it fails to accord "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense."[83] The Court reasoned that a mandatory death penalty:

> excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to blind infliction of the penalty of

76. *See, e.g.*, Greenburg, *Capital Punishment as a System*, 91 YALE L.J. 908, 917 (1982); Zimring and Hawkins, *Capital Punishment and the Eighth Amendment:* Furman *and* Gregg *in Retrospect*, 18 U.C. DAVIS L. REV. 927, 944-52 (1985). *See also, McCleskey*, 481 U.S. at 302 n.23 (1987).

77. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

78. An exhaustive analysis of eighth amendment jurisprudence is beyond the scope of this article. *But see, e.g.*, W. WHITE, THE DEATH PENALTY IN THE EIGHTIES (1987); C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981); M. MELTSNER, *supra* note 75; *see also*, Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); *Death Penalty Symposium*, 18 U.C. DAVIS L. REV. 865-1480 (1985).

79. Woodson v. North Carolina, 428 U.S. 280 (1976).

80. Roberts v. Louisiana, 428 U.S. 325 (1976).

81. *Id.* at 333-36; *Woodson*, 428 U.S. at 299-305.

82. *Woodson*, 428 U.S. at 302-03.

83. *Id.* at 304.

death.[84]

Consideration of the character and record of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the process of inflicting the penalty of death.[85]

Unlike the mandatory capital sentencing statutes, each statute which established guidance for discretion in capital sentencing passed constitutional muster.[86] In *Gregg v. Georgia*,[87] the Court approved of a bifurcated sentencing process whereby guilt or innocence is first adjudicated and, if a capital conviction results, the sentencer proceeds to a separate sentencing hearing.[88] The Court expressly approved, as a constitutionally mandated feature of any capital-sentencing procedure, the narrowing of the class of cases for which death could be imposed.[89] That narrowing function was performed by factors which could render certain crimes relatively more heinous than crimes in which the factors did not exist.[90]

Hence, the five decisions established the twin doctrines which have evolved as the major lines of constitutional capital-sentencing jurisprudence. On the one hand, "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."[91] On the other hand, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[92]

Since 1976, the Court has refined the twin doctrines by adjudicating cases that question their breadth as well as the imposition of the death penalty on other grounds. For example, the Court has clarified that the eighth amendment's need for proportionality in sentencing[93] virtually

84. *Id.*

85. *Id.*

86. *Gregg*, 428 U.S. at 206-07; *Proffitt*, 428 U.S. at 259-60; *Jurek*, 428 U.S. at 276.

87. 428 U.S. 153 (1976).

88. *Id.* at 195.

89. *Id.* at 196-98.

90. *Id.* at 197.

91. *Id.* at 199.

92. *Woodson*, 428 U.S. at 304.

93. Solem v. Helm, 463 U.S. 277, 292 (1983) (eighth amendment requires proportionality analysis to ensure that death penalty is proportional to gravity of offense and sentences imposed upon other criminals).

prohibits the death sentence for any crime except murder.[94] The Court has also held that the execution of the "presently insane," those persons who lack the understanding of the consequences and rationale of the punishment of death, is violative of the eighth amendment because it lacks any legitimate justification—it performs neither retributive nor deterrent functions.[95]

The eighth amendment requirement of objective standards to select the murder cases where capital punishment may be imposed is met if the classifications "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[96] It is not constitutionally significant whether the narrowing function is performed by narrowly drawn definitions of capital murder or by aggravating circumstances employed by the sentencer at the penalty phase of a capital trial.[97] Nor is it a matter of constitutional significance if the sentencer is presented with evidence erroneously labelled as an aggravating circumstance so long as the evidence is relevant, admissible and not otherwise constitutionally impermissible.[98]

A hallmark of eighth amendment jurisprudence is the strenuous enforcement of the principle that the defendant not be precluded from presenting, nor the sentencer precluded from considering, any evidence related to the circumstances of the individual offender or the particular offense proffered as a basis for a sentence less than death.[99] Other procedural safeguards delineated for capital defendants include a defendant's right to a lesser included offense instruction, when warranted by the evidence so that the jury is not forced to choose between a conviction for a capital crime and an outright acquittal.[100] In the interest of promoting more reliable sentencing determinations,[101] the Court has also concluded

94. *See* Coker v. Georgia, 433 U.S. 584 (1977); *see also* Tison v. Arizona, 481 U.S. 137, 158 (1987) (death sentence proportionate to major participation in felony resulting in murder when acting with reckless indifference to value of human life).

95. Ford v. Wainwright, 477 U.S. 399, 408-10 (1986).

96. Lowenfield v. Phelps, 108 S. Ct. 546, 554 (1988) (citations omitted).

97. *Id.* at 555.

98. Barclay v. Florida, 463 U.S. 939 (1983); Zant v. Stephens, 462 U.S. 862 (1983).

99. Penry v. Lynaugh, 109 S. Ct. 2934, 2946 (1989); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1987) (sentencer cannot be precluded from hearing evidence regarding the defendant's character as mitigating evidence); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Green v. Georgia, 442 U.S. 95, 96-97 (1979) (enforcement of state law evidentiary rule to preclude defendant's proffer of relevant mitigating evidence violative of Due Process Clause).

100. Hopper v. Evans, 456 U.S. 605, 610 (1982); Beck v. Alabama, 447 U.S. 625, 642-43 (1980).

101. Gardner v. Florida, 340 U.S. 349 (1977).

that a capital defendant has a due process right to be confronted with, and provided an opportunity to rebut, otherwise confidential pre-sentence investigation reports and other evidence upon which the sentencer relies.

C. *Capital Punishment and the Right to an Impartial Jury*

Likewise, special sixth and fourteenth amendment rights exist which attend capital jury trials. In the 1968 case of *Witherspoon v. Illinois*,[102] the United States Supreme Court was asked to determine whether the State of Illinois could constitutionally remove for cause all prospective jurors who, during voir dire, expressed general reservations about capital punishment.[103] Concluding that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death,"[104] the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[105] Noting that:

> [t]he most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,[106]

the Court prohibited a state's excusal of prospective jurors for cause unless they "made unmistakably clear" that they would automatically vote against the imposition of capital punishment or their attitude would prevent them from making an impartial decision as to the defendant's guilt.[107]

The *Witherspoon* Court declined to address the secondary issue of whether the process of "death-qualification,"—insuring that the jurors could follow the law and consider the imposition of a death sentence—skewed the jury toward conviction.[108] The petitioner cited surveys to show that jurors who were not conscientiously opposed to capital punish-

102. 391 U.S. 510 (1968).
103. *Id.* at 513.
104. *Id.* at 521.
105. *Id.* at 522.
106. *Id.* at 522 n.21 (emphasis in original).
107. *Id.*
108. *Id.* at 517-18.

ment were more likely to convict, and that the defendant's chances for acquittal were lessened if jurors who objected to the death penalty were excluded.[109] The Court rejected the data as "too tentative and fragmentary" to show a bias toward conviction.[110] These jurors' views on the death penalty ordinarily would not be explored during voir dire in non-capital criminal trials. Hence, when judged against non-capital criminal jurors, "death-qualified" jurors were more prone to convict, and therefore unrepresentative and not impartial. The Court concluded, however, that the evidence was "too tentative and fragmentary" to hold that any death-qualification process rendered all capital convictions unconstitutional.[111]

The "unmistakable clarity" standard for excusal in the "death qualification" process has since been modified by the Court to allow excusal upon a factual finding by the trial court that the prospective juror's views about capital punishment would "prevent or substantially impair" his ability to perform his duties as a juror.[112] However, the primary holding of *Witherspoon* remains intact. Further, the Court has applied the same standard to jurors who indicate their views in favor of capital punishment prevent or substantially impair their ability to perform their duties as jurors.[113]

In the 1986 decision of *Lockhart v. McCree*,[114] the Court squarely addressed the question left open in *Witherspoon* regarding the "conviction-proneness" of death qualified jurors. The data that *Witherspoon* dismissed as "too tentative and fragmentary" had been expanded by further evidence suggesting that "death-qualified" jurors were more "conviction-prone" than other petit jurors.[115] However, the *McCree* Court remained unpersuaded.[116] After severely criticizing the data,[117] Justice Rehnquist, writing for the Court, assumed arguendo that the data established "that 'death qualification' in fact produces juries somewhat more 'conviction-

109. *Id.* at 517 n.10.

110. *Id.* at 517.

111. *Id.* at 517-18.

112. Wainwright v. Witt, 469 U.S. 412, 420-22 (1985); Adams v. Texas, 448 U.S. 38, 45 (1980).

113. Ross v. Oklahoma, 108 S. Ct. 2273, 2276-77 (1988).

114. 476 U.S. 162 (1986).

115. *Id.* at 170-71.

116. *Id.* at 183-84.

117. For a detailed analysis of the data presented in *Witherspoon* and *McCree*, and the Court's historical trouble understanding and applying social science data, *see* Seltzer, Lopes, Dayan and Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 HOWARD L.J., 571, 576-81, 587-93 (1986).

prone' than 'non-death-qualified' juries."[118] He noted that the sixth amendment's fair cross-section requirement has never been applied to the petit jury, and to do so would be "unworkable and unsound."[119] Additionally, "*Witherspoon*-excludables," the automatic death penalty opponents, are not a distinctive group, as that term has been employed in the context of fair cross-section challenges.[120]

The Court also addressed the secondary claim that even if no fair cross-section violation in excluding scrupled jurors existed, the skewing process of death qualification deprived a defendant of an impartial jury in violation of the sixth and fourteenth amendments.[121] This argument, too, was rejected by the Court as "illogical and hopelessly impractical."[122] The Court held that "a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[123] Showing more concern for capital sentencing than for guilt determination, the Court expressly distinguished *Witherspoon*, noting that *McCree* dealt with impartiality as to the guilt determination, while *Witherspoon* involved capital sentencing.[124]

Witherspoon and its progeny, together with *McCree*, appear to set the boundaries of the Court's concern with the interplay of sixth and eighth amendment jurisprudence. Clearly, *Witherspoon* and *Turner v. Murray*[125] indicate that the Court is willing to put teeth into the eighth amendment, but equally clear from *McCree* and *Turner* is the Court's unwillingness to expand the doctrine to the guilt-determination phase of capital cases.

II. Discovering Juror Misconceptions About Parole Eligibility and the Effect of a Life Sentence to Ensure Reliability in the Capital Sentencing Decision

A fundamental tenet of the American judicial system is the constitutionally guaranteed right to an impartial jury.[126] Ancillary to this right

118. *McCree*, 476 U.S. at 173.
119. *Id.* at 174.
120. *Id.*
121. *Id.* at 177.
122. *Id.* at 178.
123. *Id.* at 184.
124. *Id.* at 183.
125. 478 U.S. 28 (1986).
126. *See generally* Lockhart v. McCree, 476 U.S. 162, 168 (1986).

is the opportunity to take reasonable steps, primarily through the voir dire process, to ensure juror impartiality.[127] A party's challenges to prospective jurors, either for cause or peremptory, may well be the most effective way to ferret out latent prejudices in potential jurors.[128] Although wide discretion is accorded trial judges in the conduct of voir dire,[129] that discretion is not unfettered[130] and counsel should be accorded wide latitude in examining prospective jurors, particularly in light of the eighth amendment's requirement of heightened reliability in capital cases.[131] The primary purpose of inquiry during voir dire is to eliminate extremism and partiality.[132] Accordingly, limitations on voir dire examination creating unreasonable risks of bias or prejudice violate due process.[133] Capital juries are entrusted to render a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.' "[134] Therefore, a defendant's right to an impartial jury, obtained primarily through the jury-selection process, must be closely safeguarded. By their very nature, capital cases often involve crimes far more repugnant than those crimes involved in non-capital cases. A far greater likelihood exists that biases and prejudices may operate undetected in capital cases.[135]

Furthermore, due process requires the sentencer to impose a sentence only with full knowledge of the range of discretionary sentencing alternatives.[136] When facing a genuine issue as to the sentencing judge's understanding of available sentencing alternatives, a reviewing court should accord the defendant a hearing before an alternative judge, so that an independent determination may be made as to whether the sentencing judge failed to exercise informed discretion.[137] For when:

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127. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

128. *See* Pointer v. United States, 151 U.S. 396, 405 (1894).

129. *Rosales-Lopez*, 451 U.S. at 190; Ristaino v. Ross, 424 U.S. 589, 594-95 (1976); State v. Phillips, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

130. Darbin v. Nourse, 664 F.2d 1109, 1112-15 (9th Cir. 1981); United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972).

131. *See supra* note 78.

132. *See* State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), *death sent. vacated*, 428 U.S. 903 (1976).

133. *See, e.g.*, Turner v. Murray, 476 U.S. 20, 37 (1986); Ham v. South Carolina, 409 U.S. 524, 527 (1973).

134. Caldwell v. Mississippi, 472 U.S. 320, 340-41 n.7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)).

135. *Turner*, 476 U.S. at 35.

136. Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980); Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988).

137. Anderson v. Jones, 743 F.2d 306, 308 (5th Cir. 1984); Hickerson v. Maggio, 691 F.2d 792, 794-95 (5th Cir. 1982).

> a judge, tutored in all the nuances of the law, must exercise *informed* discretion in sentencing, it is all the more important for lay jurors, who have convicted a defendant of a capital offense and must then say whether he will die or live, to understand fully the consequences of their decision.[138]

Prospective jurors often maintain the common misconception that a life sentence is not, in reality, a *life* sentence. Unquestionably, the public holds gross misconceptions about the actual effect of imposing a life sentence in a first-degree murder conviction.[139] According to one survey, seventy percent of the American people believe that a person given a life sentence will not remain incarcerated for the remainder of his life.[140] A recent study in Georgia revealed that the average juror believed that a murderer given a life sentence would be *released* in seven or eight years.[141] The public is inundated with media references to parole releases for convicted killers. These reports often fail to distinguish be-

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138. King v. Lynaugh, 850 F.2d 1055, 1062 (5th Cir.) (en banc), *cert. denied*, 109 S. Ct. 820 (1988) (Rubin, J., dissenting).

139. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COL. HUMAN RTS. L. REV., Spring 1987, at 211.

140. Bennack, *The Public, the Media, and the Judicial System: A National Survey of Citizen's Awareness*, 7 STATE CT. J., Fall 1983, 4, 10.

141. Codner, The Only Game In Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole, 47-50 (Jan. 24, 1986) (unpublished paper, University of Michigan School of Law) (copy on file at Loyola of Los Angeles Law Review).

Several states offer life in prison without the possibility of parole as the only alternative to a death sentence. *See* ALA. CODE §§ 13A-5-46(e)(1)-(2) (1982); ARK. STAT. ANN. §§ 5-4-603(b)-(c) (1987); CONN. GEN. STAT. ANN. § 53a-35(1) (1988); DEL. CODE ANN. tit. 11, § 4209 (1987); LA. REV. STAT. ANN. § 14:30 (West 1986); MO. ANN. STAT. § 565.030(4) (Vernon 1986); N.H. REV. STAT. ANN. § 630:1-a(III) (1986); S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); WYO. STAT. § 7-13-402 (1987). One state has changed its law to require all capital offenders sentenced after 1985 to serve forty years in prison before being eligible for parole. *See* COLO. REV. STAT. § 17-22.5-104(2)(a) (1986). Three other states require at least twenty-five years in prison before a convict serving a life sentence may be considered for parole. *See* ARIZ. REV. STAT. ANN. § 13-703-A (1982); CAL. PENAL CODE § 190(a) (West Supp. 1989) (life without possibility of parole available); FLA. STAT. ANN. § 775.082(1) (West 1976).

Other states with determinable parole-eligibility statutes require at least ten years in prison, with most requiring at least twenty years. *See* IDAHO CODE § 18-4004 (1987) (ten years); ILL. REV. STAT. ch. 11-13, para. 3-2(b)(3) (1988) (twenty years); IND. CODE ANN. §§ 11-13-3-2, 35-50-2-3(a) (Burns 1988) (fifteen years); MISS. CODE ANN. § 47-7-3(1) (1989) (ten years); NEV. REV. STAT. ANN. § 200.030(4) (Michie 1985) (ten years); N.C. GEN. STAT. § 15A-1371(a1) (1988) (twenty years); OR. REV. STAT. § 163.105(2) (1985) (twenty years); TEX. CRIM. PROC. CODE ANN. § 42.12 subsec. 15 (Vernon 1979) (twenty years); VA. CODE ANN. § 53.1-151 (1988) (fifteen years; may be increased to twenty or life without possibility of parole under certain circumstances); WASH. REV. CODE ANN. § 9.95.115 (1988) (twenty years).

However, two states allow their parole boards unfettered discretion in making parole deci-

tween persons convicted of first-degree murder and persons sentenced for lesser degrees of homicide. Given these incomplete accounts, the public gleans the impression that a life sentence does not mean a *life* sentence.

Closely akin to this notion is the public perception known as the Slovik syndrome: the expectation that the sentence will not be carried out.[142] This syndrome derives its name from the death sentence imposed on November 11, 1944 by a general court-martial on Private Eddie Slovik, the only American serviceman executed for desertion since 1864.[143] Many levels of military command which reviewed Slovik's sentence were authorized to exercise clemency.[144] Yet none did so.[145] Long after Private Slovik's death, the presiding officer of the court-martial was asked about the severe sentence.[146] He responded that no member of the sentencing panel believed the sentence would ever be carried out.[147] Persons imposing sentences may operate under this syndrome by underestimating the time a defendant will serve before parole is granted.[148]

If jurors in capital cases harbor misconceptions about parole eligibility from a life sentence and those misconceptions affect the ultimate sentencing recommendation, then counsel should be able to question prospective jurors to facilitate the intelligent exercise of challenges, either for cause or peremptory. The following two sections consider both the empirical data regarding juror perceptions about parole eligibility and the current judicial climate regarding voir dire in this area.

A. Data Demonstrating Juror Misconceptions About Parole Eligibility

Limited data are beginning to emerge demonstrating the existence of juror misconceptions about parole eligibility for defendants receiving life sentences for first-degree murder.[149] Most of this information arises from interviews with jurors in specific cases or from a sampling of a par-

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sions. *See* Op. Att'y Gen., Okla., No. 69-207 (August 21, 1969); UTAH CODE ANN. § 77-27-9 (1988).

For a more exhaustive treatment of parole eligibility in sentencing, see Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A.L. REV. 61, 128 (1989).

142. Newman, *Foreword* to Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 812 (1975).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. W. HUIE, THE EXECUTION OF PRIVATE SLOVIK 169 (1970).

148. Newman, *supra* note 142, at 812.

149. *See infra* notes 151-80 and accompanying text.

ticular venire.[150] Despite its statistical limitations, this information provides a solid basis for positing the need for voir dire questioning of the opinions held by prospective jurors as to the effect of a life sentence, the status of parole eligibility, and the likelihood of and time table for eventual release.

The case of Michael Ray Quesinberry provides a graphic illustration of the existence of juror misconceptions about parole and of the detrimental effect of those misconceptions on a capital-sentencing recommendation.[151] Quesinberry had been convicted of first-degree murder and sentenced to death.[152] After winning a new sentencing hearing on appeal,[153] he was again sentenced to die.[154] His second jury recommended[155] this sentence upon finding one aggravating circumstance: a murder committed for pecuniary gain.[156] The second jury also found seven mitigating circumstances: defendant's lack of a significant history of prior criminal activity; defendant's lack of assaultive behavior prior to the murder; defendant's adaptability to life in custody; defendant's voluntary confession to the crime; defendant's cooperation with law enforcement officers; defendant's remorse for the crime; and that the crime was out of character for defendant.[157] Immediately after a judgment of death was entered, one juror stated to a newspaper reporter: "If a person deserves a life sentence and gets it, he should serve life, instead of going and pulling five or ten years and getting parole."[158] Another juror similarly remarked: "We felt with the possibility of him being out in a short time, that wasn't fair."[159]

Given this information, defendant filed a motion for appropriate relief[160] with the trial court asking that his sentence of death be set aside.[161] Various documents, including affidavits from two jurors other than those who spoke with the newspaper reporter, supported the motion. One ju-

150. *See infra* notes 151-80 and accompanying text.

151. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), *appeal after remand*, No. 95A88 (N.C. Jul. 26, 1989) (Westlaw 1989 WL 83308).

152. *Id.*

153. *Id.*

154. *Id.*

155. Paduano & Stafford Smith, *supra* note 139, at 223-24 n.35.

156. State v. Quesinberry, No. 95A88 (N.C. Jul. 26, 1989) (Westlaw 1989 WL 83308).

157. *Id.*

158. Greensboro News & Record, Feb. 3, 1988, at Capital A6, col. 1.

159. *Id.*

160. North Carolina permits a defendant to file a post-trial motion within ten days of the entry of judgment challenging, inter alia, the fairness and impartiality of the trial. N.C. GEN. STAT. § 15A-1414(b)(3) (1988).

161. Motion for Appropriate Relief, State v. Quesinberry, No. 83-CrS-05 & 06 (Superior Court for Randolph County, filed February 12, 1988).

ror admitted that "[t]he question of parole was a primary factor in our deliberations."[162]

> [S]everal of the women jurors expressed concern that if [the defendant] received a life sentence he would be released on parole in ten (10) years, return to his drug use and commit another murder. . . . [T]en (10) years was the time period that we used during our deliberations about how much time [the defendant] *would actually spend in prison* if a life sentence was returned.[163]

This estimation of parole release was the determining factor in the jury's decision to return a death sentence.[164] Another juror agreed, saying "[t]he possibility of parole was a pretty hot issue during the deliberations."[165] The jury maintained that a life sentence would cause the defendant to "serve approximately ten (10), and no more than twelve (12), years in prison."[166]

The trial court denied the motion to set aside the death sentence and the Supreme Court of North Carolina affirmed.[167] The decision turned on the impropriety of allowing jurors to impeach their verdict by revealing internal rather than external influences.[168] Nevertheless, these facts demonstrate the existence and effect of juror misconceptions about parole in capital cases, as North Carolina requires a defendant given a life sentence for first-degree murder to serve twenty years before becom-

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162. *Id.* at app. B at 2.

163. *Id.* (emphasis added).

164. *Id.*

165. *Id.*, app. F at 1.

166. *Id.*

167. State v. Quesinberry, No. 95A88 (N.C. Jul. 26, 1989) (Westlaw 1989 WL 83308).

168. *Id.* at 12-14. *See also* Tanner v. United States, 483 U.S. 107 (1987); State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988); N.C.R. EVID. 606(b). As the *Quesinberry* court explained:

> Under North Carolina Rule 606(b), . . . allegations that jurors considered defendant's possibility of parole during their deliberations are allegations of "internal" influences on the jury. First, the "information" that defendant would be eligible for parole in about ten years was not information dealing with this particular defendant, but general information concerning the possibility of parole for a person sentenced to life imprisonment for first degree murder. Second, there is no allegation that the jurors received information about parole eligibility from an outside source. The juror affidavits state that it was the jurors' "idea," "belief," or "impression" that defendant would be released in ten years. We have said that "[i]t would be naive to believe jurors during jury deliberations do not relate the experiences they have had," and that "the possibility of parole or executive clemency is a matter of common knowledge among most adult persons." Most jurors, through their own experience and common knowledge, know that a life sentence does not necessarily mean that the defendant will remain in prison for the rest of his life. Therefore, the jurors' "belief" about defendant's possibility of parole was an "internal" influence on the jury.

State v. Quesinberry, No. 95A88 (N.C. Jul. 26, 1989) (Westlaw 1989 WL 83308) (citations omitted).

ing *eligible* for parole.[169]

A Georgia case involving potential jurors had foreshadowed the North Carolina experience.[170] After John Pope was sentenced to die, a random sample of his venire was surveyed regarding parole eligibility.[171] Those persons were asked "if a person receives a life sentence for murder, how many years on the average do you think they [sic] spend in prison before they [sic] are paroled?"[172] The mean response was 8.13 years, while thirty-five percent of the respondents (the mode) felt a defendant convicted of first-degree murder would be paroled after seven years.[173] Given Pope's previous incarceration under a life sentence, he would have been required to serve a minimum of twenty-five years before becoming *eligible* for parole if he had been given a life sentence for the murder in question.[174] These erroneous assumptions weighed heavily in the hypothetical penalty consideration. "Over two-thirds of the potential jurors stated they would be more likely to impose a sentence of life if assured that 'life' meant at least twenty-five years."[175] Thus, Pope's potential jury, like Quesinberry's actual jury, harbored gross misconceptions about parole eligibility and ultimate release. In all likelihood, his jury, like Quesinberry's, acted on these misconceptions.

A similar experience occurred in Mississippi. During a survey conducted in connection with a motion for a new trial, defense counsel questioned various persons from the jury venire.[176] Thirty-one persons responded to the following question: "If a person receives a life sentence for murder, how many years on the average do you think they [sic] spend in prison before they [sic] are paroled?" Twenty people, nearly two-thirds of those questioned, believed the defendant would be paroled in five to ten years.[177] In actuality, having been indicted as a habitual offender, the defendant would not have been eligible for parole if given a

169. N.C. GEN. STAT. § 15A-1371(a) (1988).

170. Codner, *supra* note 141; Paduano & Stafford Smith, *supra* note 139, at 220-25.

171. For a discussion of the research designed for this study, see Codner, *supra* note 141, at 46 n.115; Paduano & Stafford Smith, *supra* note 139, at 220-23 nn.31-34.

172. Codner, *supra* note 141, at 46 n.115; Paduano & Stafford Smith, *supra* note 139, at 221-22 n.31.

173. Codner, *supra* note 141, at 46 n.116; Paduano & Stafford Smith, *supra* note 139, at 222 n.33.

174. GA. CODE ANN. § 42-9-39 (1985) (persons receiving life sentence for first-degree murder who have been imprisoned previously on life sentence required to serve twenty-five years before becoming eligible for parole).

175. Codner, *supra* note 141, at 46 n.116; Paduano & Stafford Smith, *supra* note 139, at 222-23.

176. Paduano & Stafford Smith, *supra* note 139, at 223-24 n.35.

177. *Id.*

life sentence.[178] Furthermore, twenty of the thirty-one respondents would have been more likely to return a life sentence if they knew the person would never be eligible for parole.[179]

In Maryland, defense counsel have conducted post-verdict interviews[180] with thirty jurors from six capital trials, four of which resulted in life sentences and two of which resulted in death sentences. Sixty percent of these jurors acknowledged that their sentencing decision was affected by knowing a defendant might eventually be released if a life sentence was imposed. When asked how many years, on the average, they thought a defendant would actually spend in jail if sentenced to life in prison, one-half of the jurors felt only ten to fifteen years would be served.

The effect of these misconceptions was also revealed. Of the jurors who entered the deliberations favoring a sentence of death, fifty percent held this opinion because the defendant might be paroled.

Various judicial decisions also reveal that jurors discuss parole during their deliberations on sentencing.[181] Often, jurors request specific information from the trial court on this issue.[182] Typically, the jury is simply told that the matter of parole eligibility is not a proper consideration in the punishment recommendation and that the jury should not consider it.[183] In light of the Quesinberry and Pope experiences,[184] the effectiveness of such an instruction is doubtful. The courts have also failed to intervene even in the face of evidence showing that punishment was enhanced based upon underestimations of parole eligibility.[185]

From all indications, jurors harbor gross misconceptions about parole eligibility and actual time served under a life sentence imposed following conviction for first-degree murder. Jurors also act on this erroneous information. Against this backdrop, the next section considers the propriety of conducting voir dire regarding these attitudes.

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178. *See* MISS. CODE ANN. § 99-19-83 (Cum. Supp. 1987).

179. Paduano & Stafford Smith, *supra* note 139, at 224 n.35.

180. These jurors were interviewed during 1986. A compilation of their responses to various questions were provided to the authors by Gary W. Christopher of the Office of the Public Defender in Baltimore, Maryland. Dr. Richard Seltzer, Howard University, supervised the gathering of this material. The authors greatly appreciate the source of this information. A copy of the tabulated responses is on file with the authors.

181. *See, e.g.*, State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 108 U.S. 269 (1987); Keady v. State, 687 S.W.2d 757 (Tex. Crim. App. 1985) (en banc).

182. *See, e.g., Robbins*, 319 N.C. at 518, 356 S.E.2d at 310.

183. *See, e.g., id.*

184. *See supra* notes 151-75 and accompanying text.

185. *Keady*, 687 S.W.2d at 760.

B. *Voir Dire Concerning Knowledge of Parole Eligibility*

Voir dire challenges to potential jurors represent one step toward achieving the goal of an impartial jury.[186] Intelligent use of these challenges can be made only after a reasonably thorough voir dire examination. Placing limitations on voir dire which creates risk of bias or prejudice is unconstitutional.[187] When prospective jurors have fixed opinions because of pretrial publicity such that they can no longer make an impartial judgment, due process prohibits their service.[188] In such a situation, a defendant must be afforded the opportunity to conduct a thorough voir dire.[189] Similarly, a defendant accused of an interracial capital murder must be permitted to question prospective jurors on the issue of racial prejudice.[190] In *Turner v. Murray*,[191] certain "special circumstances" gave rise to "an unacceptable risk of racial prejudice infecting the capital sentencing proceeding, . . . [including] the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case."[192]

The "special circumstances" articulated in *Turner* provide an appropriate framework for analyzing the right to question prospective jurors regarding their knowledge and attitudes about parole eligibility. As the Court noted, the jury in a capital sentencing hearing retains broad discretion with respect to the penalty imposed.[193] Furthermore, and perhaps more importantly, the Court voiced concern at "the risk of improper sentencing in a capital case."[194] Surely, if these concerns are sufficient to permit a black defendant to question prospective jurors on the issue of racial prejudice, any defendant facing a jury that will determine whether he lives or dies should be able to inquire as to their knowledge of and attitudes concerning parole eligibility. As documented by the data from North Carolina, Georgia, Mississippi, and Maryland, jurors harbor and act upon serious misconceptions about parole.[195] Their

186. Pointer v. United States, 151 U.S. 396, 408 (1894).

187. *See* Turner v. Murray, 476 U.S. 28 (1986); Ham v. South Carolina, 409 U.S. 524 (1973).

188. *See, e.g.*, Patton v. Yount, 467 U.S. 1025 (1984); Irvin v. Dowd, 366 U.S. 717 (1961).

189. *See, e.g.*, Patton v. Yount, 467 U.S. 1025 (1984); Irvin v. Dowd, 366 U.S. 717 (1961).

190. *E.g.*, Turner v. Murray, 476 U.S. 28 (1986).

191. 476 U.S. 28 (1986).

192. *Id.* at 37; *accord Ham*, 409 U.S. at 525 (allowing black defendant accused of possession of marijuana to question prospective jurors regarding racial prejudice and civil rights activities). *See supra* notes 12-66 and accompanying text.

193. *Turner*, 476 U.S. at 35.

194. *Id.* at 36.

195. *See supra* notes 151-80 and accompanying text.

actions upon such erroneous information creates a risk of improper sentences in capital cases.

This issue has been squarely addressed and rejected in capital cases in two jurisdictions.[196] In *King v. Lynaugh*, the Fifth Circuit rejected any basis for "constitutionalizing . . . voir dire consideration of parole eligibility."[197] According to the Fifth Circuit, only racial prejudice and provocative pretrial publicity form an acceptable basis for a constitutional challenge to a voir dire procedure.[198] Heavy reliance was placed upon the rejection in *Ham v. South Carolina*[199] of a claim to question prospective jurors concerning possible prejudice toward people with beards:

> Ham's trial and conviction occurred circa the late 1960s and early 1970s, at the apogee of student and political activism, when the wearing of a beard might well have been thought to prejudice many prospective jurors. Nevertheless, the Court refused to constitutionalize an inquiry which, in its view, would have suggested no principled limits on intrusive appellate review of voir dire.
>
> We, likewise, are unable to distinguish possible prejudice based on jurors' misconceptions about parole law from "a host of other possible similar prejudices." . . . Interrogating veniremen about Texas parole law raises, if anything, a more attenuated possibility of prejudice than does a question about jurors' attitudes toward people with beards.[200]

Analogizing juror misconceptions about parole eligibility to attitudes regarding beards unduly trivializes the constitutional question. It belies the facts, demonstrated from data gathered in numerous states, that jurors harbor misconceptions about parole and proceed to act upon them in the capital sentencing determination. To say that such concerns raise "a more attenuated possibility of prejudice"[201] than attitudes about people who wear beards ignores reality.

The Fifth Circuit also noted that "[t]he views of a lay veniremen about parole are no more likely to be both erroneous and prejudicial than are his views on the defendant's right not to take the stand, the law of

196. King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 820, 109 S. Ct. 1563 (1989); State v. McNeil, 324 N.C. 33, 375 S.E.2d 909, *petition for cert. filed*, (Apr. 24, 1989).

197. *King*, 850 F.2d at 1059.

198. *Id.*

199. 409 U.S. 524 (1973).

200. *King*, 850 F.2d at 1060.

201. *Id.*

parties, the reasonable doubt standard, or any other matter of criminal procedure."[202] This statement implies that a defendant could be precluded from questioning prospective jurors regarding their knowledge of and attitudes toward matters such as the presumption of innocence and a defendant's constitutional right not to testify. As a practical matter, of course, prosecutors and defense counsel alike routinely question jurors about these matters.

King also placed great reliance upon jury instructions to disregard parole in the deliberations: "If the jurors paid attention during voir dire and followed the trial court's charge, as we generally presume they do, any pre-existing misconception about parole law would have been ignored."[203] As the experiences in North Carolina, Georgia, Mississippi and Maryland reveal, however, jurors may be routinely acting upon their misconceptions about parole law irrespective of instructions to the contrary.[204]

The second jurisdiction to reject a defendant's claim regarding inability to voir dire prospective jurors about parole was North Carolina.[205] The North Carolina Supreme Court, relying on *King*, concluded "that to 're-inject notions of parole eligibility at the forefront of the judicial proceedings,' . . . would be an improvident practice."[206] Other courts have adjudged this request an improvident practice based upon the well-settled notion that jurors in capital cases are forbidden from considering the possibility of parole in their deliberations as to sentence.[207]

The rationale of these decisions is fatally flawed. At bottom, they rest upon the assumption that jurors follow the trial court's instructions and do not consider the matter of parole in their capital-sentencing determination. All of the empirical evidence demonstrates this is not the case.[208] Rather, average jurors who continually read media "reports of grisly crimes committed by parolees" believe, however erroneously, "that most convicted murderers are back on the streets in less than ten years."[209] Thus, an unreasonable risk exists that misconceptions about

202. *Id.*

203. *Id.*

204. *See supra* notes 151-80 and accompanying text.

205. *McNeil*, 324 N.C. at 43, 375 S.E.2d at 916.

206. *Id.* at 44, 375 S.E.2d at 916 (quoting King v. Lynaugh, 850 F.2d 1055, 1061 (5th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 820, 109 S. Ct. 1563 (1989)).

207. *See, e.g.*, Rose v. State, 752 S.W.2d 529, 535 (Tex. Crim. App. 1988); State v. Robbins, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 108 S. Ct. 269 (1987).

208. *See supra* notes 151-80 and accompanying text.

209. *King*, 850 F.2d at 1062 (Rubin, J., dissenting).

the possibility of a capital defendant's release may lead a jury to impose a sentence of death. To simply deem such voir dire "an improvident practice" pays undue homage to the ways of the past in defiance of new information.

As a related matter, a defendant should be permitted to introduce evidence of his ineligibility for parole for a substantial period of time. Any significant time during which a defendant is ineligible for parole should be considered as a mitigating factor during sentencing.[210] The sentencer in a capital case may

> "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death" . . . . Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence."[211]

These rules are "well established"[212] and "beyond dispute."[213] In *Eddings v. Oklahoma*,[214] the Court held that, once a state legislature permits consideration of any of a myriad of circumstances as might form the basis for a sentence less than death, the sentencer is required to listen to a proffered circumstance.[215] A state may not then limit the sentencer's consideration of any relevant circumstance that might cause it to impose a sentence less than death.[216] Any relevant information offered by the defendant in this regard must be considered.[217]

On this basis, a defendant facing the death penalty should be allowed to place before the sentencing jury relevant and competent evidence regarding his eligibility for parole should a life sentence be granted.[218] The sentencing authority may use any relevant evidence which causes it to believe that death may not be appropriate and allow

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210. The mitigating effect of ineligibility for parole for a substantial period of time might work as follows: If a defendant is found guilty of a particularly heinous crime, the sentencing jury might want to ensure that the defendant serve at least ten years. If the jury thought he would serve only one-half of any sentence imposed, it might sentence him to twenty years thinking that even if the defendant was released on good behavior after ten years, at least ten years would be served. However, if the jury knew he would be ineligible for parole for at least the next ten years a sentence of only ten years may be imposed.

211. Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original)).

212. *Id.* at 4.

213. Mills v. Maryland, 108 S. Ct. 1860, 1865 (1988).

214. 455 U.S. 104 (1982).

215. *Id.* at 115 n.10.

216. *Id.* at 113-14.

217. McCleskey v. Kemp, 107 S. Ct. 1756, 1774 (1987).

218. *See* Doering v. State, 313 Md. 384, 411-12, 545 A.2d 1281, 1295 (1988).

such mitigating evidence to outweigh the aggravating circumstances.[219]

In *Doering v. State*,[220] the Maryland Supreme Court noted "that a jury seeking to determine the appropriateness of a life sentence will be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence must certainly be considered a relevant mitigating circumstance."[221] The *Doering* court concluded that a defendant is entitled to have the jury consider relevant, competent, and non-misleading information "concerning his eligibility for parole in the event a life sentence is imposed . . . ."[222]

It is beyond peradventure that jurors harbor misconceptions about parole eligibility for persons given a life sentence upon conviction of first-degree murder.[223] Moreover, jurors act on this erroneous information.[224] A defendant facing a jury's decision of life or death can only hope for an impartial decision if prospective jurors are questioned on their knowledge of and attitudes toward parole. Persons unable to make an impartial sentencing decision may then be removed. To deny him that opportunity contravenes basic constitutional principles.

III. IDENTIFYING AND EXCUSING JURORS UNABLE TO CONSIDER MITIGATING EVIDENCE PROFFERED BY THE DEFENSE FOR THE PENALTY PHASE OF THE TRIAL

The sixth, eighth and fourteenth amendments to the United States Constitution guarantee that a capital defendant may not be sentenced to death by persons unable to conscientiously consider mitigating evidence "stemming from the diverse frailties of humankind" offered by the defendant as a reason not to sentence him to death.[225] Where a defendant can show potential for a "per se bias"[226] against these "mitigating" factors among the jurors who may have to choose between a sentence of life imprisonment and a sentence of death, he should be allowed to: (1) explore this potential on voir dire; (2) exclude for cause those jurors who

219. *See* Foster v. State, 304 Md. 439, 475, 499 A.2d 1236, 1254 (1985), *cert. denied*, 478 U.S. 1010 (1986).

220. 313 Md. 384, 545 A.2d 1281 (1988).

221. *Id.* at 411-12, 545 A.2d at 1295.

222. *Id.*

223. *See supra* notes 151-80 and accompanying text.

224. *See supra* notes 151-80 and accompanying text.

225. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

226. This Article defines per se bias as a bias against the potential effect of a class of evidence to mitigate the severity of a crime based not on the facts of a particular case but on a belief that such evidence is not, and can never be, mitigating.

express such a bias; and, (3) where peremptory challenges are available, peremptorily excuse those jurors whose responses, while not sufficiently biased to warrant excusal for cause, nevertheless give the defendant pause.

The focus of eighth amendment jurisprudence in capital cases has centered, to a large extent, on delineating constitutionally appropriate considerations for the sentencer that carefully constrain discretion.[227] While these have not been developed completely, there are some sentencing considerations upon which the Constitution permits no discretion.[228] "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [the sentencer] may not give it no weight by excluding such evidence from [its] consideration."[229] The United States Supreme Court has applied at least two working definitions for constitutionally relevant mitigating circumstances. One definition focuses on the individual culpability of the defendant. "[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[230] The other definition of mitigating circumstances is much broader. It focuses on evidence from which the sentencer could draw "favorable inferences from the testimony . . . that would be mitigating in the sense that they might serve as a basis for a sentence less than death."[231] Given that the sentencer may not refuse to consider relevant mitigating evidence and must give it independent mitigating weight,[232] prospective jurors who are unwilling to weigh mitigating evidence due to their per se bias against such evidence should not be

227. *See e.g.*, Solem v. Helm, 463 U.S. 277, 303 (1983) (eighth amendment's requirement of proportionality analysis virtually prohibits death penalty except for murder); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (sentencer must listen to mitigating evidence offered by defendant to avoid imposition of death); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Stewart, Blackmun, Powell & Stevens, JJ., plurality opinion) (state must sentence similarly situated defendants in a similar manner); Gregg v. Georgia, 428 U.S. 153, 198 (1976) (state must channel sentencers discretion to impose death by clear and objective standards); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (sentencer's discretion must be constrained by state through specific and detailed guidance); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (constraint of sentencer's discretion must make the process for imposing death rationally reviewable).

228. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (eighth amendment prohibits execution of presently insane); Edmund v. Florida, 458 U.S. 782 (1982) (eighth amendment does not permit imposition of death penalty on defendant who without intent to kill, aids and abets felony which results in murder committed by others).

229. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

230. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See also*, Skipper v. South Carolina, 476 U.S. 1, 12 (1986) (Powell, J., concurring).

231. *Skipper*, 476 U.S. at 4-5.

232. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988); *Eddings*, 455 U.S. at 114-15.

eligible for jury service and should be excused for cause—such jurors are clearly unable to follow the law.

Establishing whether prospective jurors harbor per se biases against particular mitigating circumstances should be a function of voir dire. The Court has noted that:

> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. . . . Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule . . . .[233]

Case law suggests that the Constitution compels voir dire questioning about such bias. For example, in *Ristaino v. Ross*[234] the Court recognized that where a defendant can show a constitutionally significant likelihood that, absent specific questioning about racial bias, "the jurors would not be indifferent as [they stand] unsworne,"[235] that failure to ask such questions during voir dire would be reversible error.

The rationale of *Turner v. Murray*,[236] which held that the accusation of an interracial capital crime entitles the defendant to voir dire the venire members about racial bias, persuades and compels the conclusion that a capital defendant is entitled to voir dire the venire members about per se bias against mitigating circumstances.[237] The *Turner* Court noted that the wide discretion granted to a jury in capital sentencing makes such a proceeding uniquely susceptible to undetected bias. The Court stated that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for . . . prejudice to operate but remain undetected."[238] Undetected prejudice is particularly likely in jurisdictions that grant broad discretion to the sentencing jury after the defendant has been found to be eligible for the death sentence based on a finding of aggravating circumstances.[239] Even in those

233. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (citations omitted).

234. Ristaino v. Ross, 424 U.S. 589 (1976).

235. *Id.* at 596-97 (quoting Coke on *Littleton*, 155b (19th ed. 1832)).

236. 476 U.S. 28 (1986).

237. *Id.* at 33.

238. *Id.* at 35.

239. *Id.* at 34. Such jurisdictions include: Delaware (DEL. CODE ANN. tit. 11, § 4209(d) (1987)); Florida (FLA. STAT. § 921.141(2)(c) (1985)); Georgia (GA. CODE ANN. § 27-2534.1 (1988)); Indiana (IND. CODE § 35-50-2-9(e) (1985)); Kentucky (KY. REV. STAT. ANN. § 532.030(4) (Baldwin 1985)); Louisiana (LA. REV. STAT. ANN. § 905.6 (West Supp. 1989));

jurisdictions that provide more narrow guidelines for imposition of the death penalty, this constitutional obligation would still require the sentencer to consider mitigating circumstances.[240]

A defendant's general right to ask pointed questions during voir dire to root out any bias highly relevant to the particularized facts of a case[241] should include a specific right to ask pointed questions to detect the inability to at least consider factors which may mitigate a sentence when death may be imposed. For example, in the highly publicized "Chicago 7"[242] case, the Seventh Circuit reversed the convictions for violation of the federal Anti-Riot Act,[243] holding that the failure of the trial court to make specific inquiry, upon request, into prospective jurors' attitudes about the Vietnam War, the hippie counter-culture, and the Chicago police force deprived the defendants of a fair trial as guaranteed by the due process clause.[244] In so holding, the court "pointed out the inadequacy of a general question in testing a juror's possible prejudice in a specific area where it may well exist."[245] A general question was found to be insufficient because the venire members may not be aware of their own prejudices or able to recognize and disclose any bias which might affect

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Mississippi (MISS. CODE ANN. § 99-19-101(d) (1973)); Missouri (MO. REV. STAT. § 565.030.4(4) (1979)); Nevada (NEV. REV. STAT. § 175.554.2(c) (1986)); New Hampshire (N.H. REV. STAT. ANN. § 630:5(IV) (1986)); New Mexico (N.M. STAT. ANN. § 31-20A-2(B) (1987)); Oklahoma (OKLA. STAT. tit. 21, § 701.11 (1983)); South Carolina (S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 1985)); South Dakota (S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1988)); Utah (UTAH CODE ANN. § 76-3-206 (1978)); Vermont (VT. STAT. ANN. tit. 13, § 2303(c) (Supp. 1988)); Virginia (VA. CODE ANN. § 19.2-264.4(c) (1983)); Washington (WASH. REV. CODE ANN. § 10.95.060(4) (West Supp. 1988)); Wyoming (WYO. STAT. § 6-2-102(e) (1988)).

240. *Eddings*, 455 U.S. at 114-15.

241. *Ristaino v. Ross* held that where special circumstances exist which prove a significant likelihood of bias, the Constitution entitles the defendant to voir dire questioning about that bias. Ristaino v. Ross, 424 U.S. 589, 596 (1976). *See supra* notes 29-47 and accompanying text. In holding that Ross was not entitled to voir dire inquiry on racial prejudice simply because his trial involved an interracial crime, the Supreme Court noted that *Ham* had required such inquiry in part because racial considerations were integral to Ham's defense. *Id.* Ham's defense was premised on the proposition that he was framed because he was a civil rights worker. *Id.* Hence, the Court at least implied that the constitutional right to voir dire inquiry as to specific biases are premised on the connection of those subjects to the trial of the case.

242. United States v. Dellinger, 472 F.2d 340, 368-69 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). In *Dellinger*, several leaders of the Youth International Party, an anti-war counter-culture political party known as the "Yippies," were tried for rioting near the 1968 Democratic National Convention in Chicago. *Id.* at 348.

243. *Id.* at 409.

244. *Id.* at 368-70.

245. *Id.* at 369 (citing United States v. Robinson, 466 F.2d 780, 782 (7th Cir. 1972); United States v. Lewin, 467 F.2d 1137, 1138 (7th Cir. 1972)).

the trial of the case.[246] This is particularly true when the venire is not made aware of the critical issues involved in the trial.[247] The Seventh Circuit concluded that "it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause."[248]

The Seventh Circuit's reasoning was rooted in the defendants' rights to exercise challenges for cause and to intelligently exercise peremptory challenges.[249] The Tenth Circuit has similarly noted that in a case which relied heavily on law enforcement officers' testimony, the failure of the trial court to conduct voir dire inquiry on whether the jurors would give undue weight to the testimony of police officers could constitute reversible error.[250]

Many courts require voir dire to question whether venire members are able to follow the law and, more specifically, are able to follow specific legal principles likely to affect the trial of the case. For example, the Sixth Circuit has held that the Constitution requires a trial court to inquire into the venire members' ability to accord the defendant the presumption of innocence and to hold the government to proof beyond a reasonable doubt, if such inquiry is requested by the defendant.[251] The court's rationale for this constitutional requirement was the protection of the defendant's right to intelligently exercise peremptory challenges.[252]

The California Supreme Court has held "that a question about a prospective juror's willingness to apply a specific doctrine of law if so instructed should be permitted if the doctrine is likely to be applied at trial."[253] Also, the Nevada Supreme Court has concluded that the *Witherspoon* doctrine[254] requires a trial court, upon request, to conduct voir dire inquiry of prospective jurors' values and personal convictions in capital cases.[255] The Nevada court reasoned that "[b]ecause a verdict of guilty [in a capital case] leads to the ultimate question of whether the accused should be executed, a decision of paramount importance to the defendant, the personal beliefs and convictions of the members of the

246. *Id.* at 367.
247. *Id.*
248. *Id.* (*citing* Kiernan v. Van Schaik, 347 F.2d 775, 779 (3rd Cir. 1965)).
249. *Id.* at 367.
250. *Id.*
251. United States v. Hill, 738 F.2d 152, 153 (6th Cir. 1984), *cert. denied*, 474 U.S. 994 (1985).
252. *Id.* at 155.
253. People v. Williams, 29 Cal. 3d. 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).
254. *See supra* notes 102-13 and *infra* notes 258-62 and accompanying text.
255. Milligan v. State, 101 Nev. 627, 633, 708 P.2d 289, 293 (1985), *cert. denied*, 479 U.S. 870 (1986).

jury are highly relevant."[256]

As juror attitudes about police testimony must be explored on voir dire when police testimony is central to the trial of a criminal case, juror attitudes about mitigating factors should be explored on voir dire when those factors may be central to whether a given individual lives or dies. Thus, exploring a prospective jurors' ability to consider and give effect to proffered mitigating evidence may be more essential than exploring their ability to apply the presumption of innocence or to hold the government to proof beyond a reasonable doubt.

IV. THE PROSECUTION'S PEREMPTORY REMOVAL OF "DEATH SCRUPLED," BUT ELIGIBLE JURORS[257]

Witherspoon v. Illinois[258] held that the state's removal of all who expressed scruples against the death penalty and all who opposed it in principle "crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die."[259] Years later, the Court clarified the *Witherspoon* rule to hold that a juror may be excluded for cause in a capital case only if he harbors views about the death penalty that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[260]

Witherspoon and its progeny establish a limitation on the state's power to exclude jurors in death penalty cases. This limitation prohibits the state from entrusting the solemn duty of determining whether an individual should live or die to a jury deliberately organized to return a death sentence.[261] The constitutional principle animating *Witherspoon* is that the imposition of a death penalty by a jury engineered by the state to be biased toward death cannot be squared with the fundamental constitutional right to an impartial jury.[262]

Prosecutors commonly sweep from the jury "all jurors who indi-

256. *Id.*

257. The authors wish to thank Professor Stanton D. Krauss for his thoughtful and invaluable contributions to this section of the article.

258. 391 U.S. 510 (1968). See *supra* notes 102-13 and accompanying text for a discussion of *Witherspoon*.

259. *Witherspoon*, 391 U.S. at 520-21.

260. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1979)). Jurors whose views about the death penalty would not compel their exclusion under this test are commonly referred to as "death qualified" jurors. *Id.* at 440 (Brennan, J., dissenting).

261. Gray v. Mississippi, 481 U.S. 648, 666-77 (1987).

262. *Witherspoon*, 391 U.S. at 523.

cate[ ] the slightest uncertainty about the death penalty."[263] In *Brown v. Rice*,[264] for example, only nine potential jurors questioned by the state during voir dire indicated any hesitation about imposing the death penalty.[265] Each was systematically removed by the prosecutor using peremptory challenges.[266] Consequently, the district court held that the prosecutor's deliberate tactic stacked the deck in favor of death and failed to satisfy the sixth and fourteenth amendments' guarantee of an impartial jury as construed in *Witherspoon*.[267] In so holding, the court found that the prosecutor's use of peremptory challenges was not exempt from judicial scrutiny under the sixth amendment's entitlement to an impartial jury,[268] and that it was unconstitutional for him to use his peremptory challenges consistently to exclude potential jurors who harbored reservations about the death penalty.[269]

While the district court in *Brown v. Rice* found that the peremptory removal of death scrupled jurors violated the right to an impartial jury, this question is by no means settled. At least two federal courts of appeals have ruled that the prosecutor's removal of scrupled jurors did not offend the Constitution.[270] In addition, the North Carolina Supreme Court took issue with the district court's opinion in *Brown v. Rice* and ruled that no violation of a capital defendant's right to a fair and impartial jury occurs when the prosecutor uses peremptory strikes to remove jurors with reservations about the death penalty.[271] Furthermore, while this issue has engendered considerable debate, the United States Supreme Court has never received briefs or heard arguments on the issue, nor has

263. Brown v. North Carolina, 479 U.S. 940, 944 (1986) (Brennan, J., dissenting from the denial of certiorari). *See also Gray*, 481 U.S. at 667.

264. 693 F. Supp. 381 (W.D.N.C. 1988).

265. *Id.* at 390.

266. *Id.*

267. *Id.* at 393.

268. *Id.* at 392.

269. *Id.* at 393. The court stated:

> *Witherspoon* and its progeny are rooted in the Sixth and Fourteenth Amendments constitutional right to an impartial jury, a right which goes to the very integrity of our criminal justice system. If we were to allow the state to achieve through its use of peremptory challenges what for cause is clearly prohibited under *Witherspoon* and its progeny, we would be rendering the capital defendant's right to an impartial jury meaningless, and sanctioning the abusive use of the peremptory challenge.

Id. at 394.

270. Sonnier v. Maggio, 720 F.2d 401, 406-07 (5th Cir. 1983); Antone v. Strickland, 706 F.2d 1534, 1540 (11th Cir. 1983). At the time these cases were decided, however, a prosecutor's use of peremptory challenges was considered sacrosanct and was virtually immune from constitutional challenge. *But see* Swain v. Alabama, 380 U.S. 202, 222 (1965) (peremptory challenge no longer immune from constitutional limits).

271. State v. Fullwood, 323 N.C. 371, 381-83, 373 S.E.2d 518, 525-26 (1988).

it ruled on the merits of the question.[272] However, as argued below, the policies and precedent underpinning the right to an impartial jury in the special context of a capital sentencing proceeding demonstrate that *Brown v. Rice* ruled correctly that the prosecutor's exclusion of all jurors who were hesitant about applying the death penalty conflicts with the sixth and fourteenth amendment rights to an impartial jury.[273]

A. Prosecutors Should Not Systematically Use Peremptory Challenges to Overcome a Capital Defendant's Right to an Impartial Jury

One of the primary rationales for according a right to a jury trial is to provide "a hedge against the overzealous or mistaken prosecutor."[274] That hedge is obliterated if the prosecutor is permitted to circumvent the sixth amendment by peremptorily excluding all jurors less zealous in the pursuit of the death penalty than the prosecutor, yet not excludable for cause under the *Witherspoon* standard.[275]

The prosecutor in *Brown v. Rice*[276] removed every juror who might possibly be affected by imposing a death penalty.[277] In essence, the prosecutor struck from the jury everyone whose responses suggested to him that deciding whether a human being should be put to death might cause them to "invest their deliberations with greater seriousness and gravity."[278] Creating a hanging jury by systematically removing every potential juror who follows the oath and applies the law, but regards the duty as a solemn one, is precisely the evil that *Witherspoon* and its progeny forbid.

In her opinion concurring in the denial of certiorari in *Brown v. North Carolina*,[279] Justice O'Connor took the position that the limited

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272. *See* Gray v. Mississippi, 481 U.S. 648 (1987); Brown v. North Carolina, 479 U.S. 940 (1986).

273. *Rice*, 693 F. Supp. at 392-93.

274. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

275. The Supreme Court has explained the State's limited power to exclude such jurors due to their reservations about the death penalty:

> [I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instruction of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Boulden v. Homan, 394 U.S. 478, 483-84 (1969). See *supra* notes 102-13 and 258-62 and accompanying text for a discussion of *Witherspoon*.

276. 693 F. Supp. 381 (W.D.N.C. 1988).

277. *Id.* at 390.

278. Adams v. Texas, 448 U.S. 38, 49 (1980).

279. Brown v. North Carolina, 479 U.S. 940, 941 (1986) (O'Connor, J., concurring in the denial of certiorari).

number of peremptory challenges granted to a prosecutor prevents the prosecutor from using peremptory challenges to achieve the kind of jury that *Witherspoon* condemned.[280] This position is inconsistent with the real world of capital trials and ignored the facts of the *Brown* case.[281] The prosecutor at David Brown's trial was allowed to exercise fourteen peremptory challenges.[282] That number was more than ample to permit the prosecutor to achieve exactly the end that *Witherspoon* and *Witt* held unconstitutional—the systematic removal of everyone with reservations about the death penalty. Indeed, the prosecutor was able to go quite a bit farther with the peremptory challenges than was ever contemplated by the United States Supreme Court in *Witherspoon v. Illinois*,[283] *Adams v. Texas*,[284] or *Wainwright v. Witt*.[285] Essentially, the prosecutor removed everyone who did not positively adhere to a lifelong enthusiasm for the imposition of the death penalty.[286]

Given that public support for the death penalty has reached a new high—according to a recent Gallup poll seventy-nine percent of the public presently favor capital punishment[287]—it is difficult to imagine a case in a state providing an ample number of peremptory challenges, in which the prosecutor could not be able to achieve the same result at will. Brown's prosecutor, for instance, needed only nine of his fourteen peremptory challenges to remove every juror who did not share his zeal for capital punishment.[288] The shrinking number of people with reservations about the death penalty makes it easy for a prosecutor to use peremptory challenges to obtain the very kind of jury that *Witherspoon* condemns.

Despite the ease of creating such a jury, the process clearly affronts justice. One commentator notes:

> [P]rosecutorial peremptory challenge practices result in juries that do not reflect the conscience of the community; rather, they reflect community sentiment purged of its reluctance to impose a death sentence. The jury selection process that pro-

280. *Id.* (O'Connor, J., concurring in the denial of certiorari).

281. *See* Krauss, *Death-Qualification After* Wainwright v. Witt: *The Issues in* Gray v. Mississippi, 65 WASH. U.L.Q. 507, 541 n.153 (1987).

282. North Carolina allows 14 peremptory challenges in this situation. N.C. GEN. STAT. § 15A-1217 (1986).

283. 391 U.S. 510 (1968).

284. 448 U.S. 38 (1979).

285. 469 U.S. 412 (1985).

286. *Rice*, 693 F. Supp. at 390.

287. *Death Penalty Support Hits Record High*, Raleigh (N.C.) News and Observer, December 4, 1988, at 23A, col. 1.

288. *Rice*, 693 F. Supp. at 390.

> duces such a result runs a serious risk of imposing death sentences that do not comport with society's aggregated understanding of justice.[289]

Moreover, if this common prosecutorial practice is constitutional, *Witherspoon* is effectively overruled. The Court has consistently taken the position that peremptory challenges are exclusively "a creature of statute" and that "it is [therefore] for the State to determine the number of peremptory challenges to be allowed and to define their purpose and the manner of their exercise."[290] The lack of constitutional limits on the number of peremptory challenges allows a state to endow prosecutors with thirty or fifty or one hundred peremptory challenges in capital cases, thereby insuring that no venire member who expresses even the slightest reservation about the death penalty could ever serve on a capital-sentencing jury. This result completely defeats the capital defendant's right to an impartial jury as established in *Witherspoon*. A partial jury created through the use of challenges called "peremptory" is no different than one created through the use of challenges called "cause." The name of the mechanism used is different, but in either event, the jury is equally partial and equally violative of the sixth and fourteenth amendments.

In his dissenting opinion in *Gray v. Mississippi*,[291] Justice Scalia suggested that a prosecutor's peremptory removal of jurors with reservations about the death penalty is not within the ambit of the *Witherspoon* doctrine because the prosecutor's peremptory challenges can be offset by the defendant's own peremptory challenges removing death penalty advocates.[292] However, a similar argument was made by the State of Texas in *Adams v. Texas*[293]—an argument the Court rejected.[294] In *Adams*, the state suggested that the Texas statute at issue[295] was neutral with respect to the death penalty since the defendant was theoretically able to remove anyone who unduly favored the death penalty.[296] The Court wrote:

> [I]t is undeniable . . . that such jurors will be few indeed as

289. Winnick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 79 (1982).

290. Ross v. Oklahoma, 108 S. Ct. 2273, 2279 (1988).

291. 481 U.S. 648 (1987).

292. *Id.* at 679-80 (Scalia, J., dissenting).

293. 448 U.S. 38 (1980).

294. *Id.* at 49.

295. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). The statute provided that:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory upon conviction of a capital felony. A prospective juror shall be disqualified from serving as juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

296. *Adams*, 448 U.S. at 49.

> compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31(b) as a defense to challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon*.[297]

The clear majority of death penalty proponents in the population[298] renders ineffective the use of defense peremptory challenges to offset the prosecution's peremptory challenges. In any event, the law has never conditioned a defendant's right to an impartial jury upon his adroit use of peremptory challenges. We know from *Witherspoon* and its progeny that a judge's improper removal for cause of a juror is unconstitutional despite the possession of peremptory challenges by the defendant.[299] The same should be true for a peremptory removal of a juror.[300] The question, therefore, is not whether the defendant can use his peremptory challenges to remove jurors who stridently believe in the death penalty (a limited ability given the popularity of capital punishment), but whether the state has acted systematically to create a jury stacked toward imposing a death sentence.

B. A Prosecutor's Use of Peremptory Challenges Should be Subject to Constitutional Scrutiny

In considering the appropriateness of prohibiting the prosecutor from using his peremptory challenges to circumvent a defendant's right to an impartial jury, one should recall that the peremptory challenge historically has been a device designed to protect defendants.[301] Blackstone expressed the rationale for the challenges:

> [I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.[302]

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297. *Id.*

298. *See supra* note 287 and accompanying text.

299. *Witherspoon*, 391 U.S. at 522; Gray v. Mississippi, 107 S. Ct. 2045, 2051 (1987); Wainwright v. Witt, 469 U.S. 412, 423 (1985).

300. *See, e.g.*, Brown v. Rice, 693 F. Supp. 381, 389 (W.D.N.C. 1988) (prosecutor's use of peremptory challenges to exclude all jurors who expressed reservations about the death penalty violated defendant's right to a fair trial).

301. Swain v. Alabama, 380 U.S. 202, 242 (1965) (Goldberg, J., dissenting).

302. *Id.* (Goldberg, J., dissenting) (quoting 4 W. BLACKSTONE, COMMENTARIES *353 (italics added)).

The protective function was especially important in capital cases.[303] The rule of *in favorem vitae* granted capital defendants the power to remove jurors who seemed biased in favor of the government even though the defendant was unable to articulate a legal cause for their exclusion.

Even though the purpose of the peremptory challenge was to insure fairness to the defendant, as recognized in *Brown v. Rice*,[304] peremptory challenges are currently not constitutionally protected.[305] The Supreme Court has sanctioned several restrictions on the ability of defendants to exercise their peremptory challenges.[306] As recently as June, 1988, while discussing a requirement that defendants exercise their peremptory challenges to cure erroneous refusals of the trial court to remove jurors for cause, Chief Justice Rehnquist wrote:

> We think there is nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of impaneling an impartial jury. Indeed, the concept of a peremptory challenge as a totally freewheeling right unconstrained by any procedural requirement is difficult to imagine.[307]

Traditionally, under the rule set down by *Swain v. Alabama*,[308] a defendant had to prove systematic and consistent exclusion of potential jurors on account of race to establish purposeful discrimination in a prosecutor's exercise of peremptory challenges.[309] While *Swain* did not immunize the prosecutor's use of peremptory challenges from constitutional scrutiny, in practice, the prosecutor was virtually unconstrained in excluding jurors who shared the defendant's race:[310]

> The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control . . . and the constitutional prohibition on exclusion of persons from jury service on account of race. . . . While the Constitution does not confer a right to peremptory challenges, . . . those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury. . . . To preserve the peremptory nature of the prosecutor's challenge,

303. *Id.* (Goldberg, J., dissenting).
304. 693 F. Supp. 381 (W.D.N.C. 1988).
305. *Id.* at 392-93. *See also* Ross v. Oklahoma, 108 S. Ct. 2273, 2278 (1988).
306. *Swain*, 380 U.S. at 243-44 (Goldberg, J., dissenting). *See, e.g.*, Pointer v. United States, 151 U.S. 396 (1894); Stilson v. United States, 250 U.S. 583 (1919).
307. *Ross*, 108 S. Ct. at 2279.
308. 380 U.S. 202 (1965).
309. *Id.* at 227.
310. *Id.* at 209.

> the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges.[311]

The court has also sanctioned incursions on prosecutorial use of the peremptory challenge. For example, in *Batson v. Kentucky*,[312] the Supreme Court curtailed prosecutors' use of peremptory challenges.[313] Justice Brennan reasoned that because the peremptory challenge is not a constitutional right, the state's exercise of the challenge must be limited to constitutionally permissible uses.[314] *Batson* held that the Equal Protection Clause of the fourteenth amendment forbids a prosecutor from peremptorily excluding prospective jurors who are members of the same cognizable racial group as the defendant solely on account of their race.[315]

The *Batson* Court rejected the state's contentions that limiting the use of peremptory challenges would "eviscerate the fair trial values" served by the challenge and that "unfettered exercise of the challenge is of vital importance to the criminal justice system."[316] While recognizing that peremptory challenges occupy an important position in our trial procedures, the Court ruled that the susceptibility of the challenge to racially discriminatory abuse mandated the rule it announced.[317]

Justice O'Connor has noted that *Batson* reflects the Court's commitment to fighting racial discrimination and that *Batson* cannot be applied as a general prohibition against prosecutors' abuse of peremptory challenges to obtain unconstitutional ends.[318] To the contrary, the rationale of *Batson* and the Supreme Court opinions providing special protection to defendants in capital-sentencing proceedings[319] compels the conclu-

311. Batson v. Kentucky, 476 U.S. 79, 91 (1987) (footnote and citations omitted).

312. 476 U.S. 79 (1987).

313. Brown v. North Carolina, 479 U.S. 940, 944-45 (Brennan, J., dissenting from denial of certiorari).

314. *Id.* (Brennan, J., dissenting from denial of certiorari)

315. *Batson*, 476 U.S. 79.

316. *Id.* at 98.

317. *Id.* at 98-99.

318. *Brown*, 479 U.S. at 941 (O'Connor, J., concurring in denial of certiorari).

319. The Supreme Court has long recognized that:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.). This qualitative difference, the Court has held, requires "a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983).

sion that *Witherspoon v. Illinois*[320] and its progeny forbid the state from using its peremptory challenges to bar people "from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths."[321]

Turner v. Murray,[322] a capital case involving the issue of jury selection, demonstrates that protection of a capital defendant's right to an impartial jury is at least as significant as the racial discrimination the Court sought to prevent in *Batson*. In *Turner*, the Court found that the trial judge's failure to permit voir dire questioning of prospective jurors about racial prejudice violated the defendant's right to an impartial jury.[323] The Court awarded Turner a new sentencing hearing even though it affirmed his conviction.[324] One scholar believes that the Court's judgment in *Turner* should restrict the abuse of peremptory challenges in capital proceedings:

> Of course, the Court does, in fact "pick and choose" among constitutional rights, preferring some and disfavoring others. But *Turner v. Murray* indicates that the pecking order may be just the opposite of what Justice O'Connor has suggested [in *Brown v. North Carolina*]. In *Turner*, a black man challenged his murder conviction and death sentence on the ground that the trial court denied his request to ask the prospective jurors at voir dire whether the interracial nature of the crime with which he was charged would affect their ability to decide the case "impartially." The Court decided that the risk of discrimination in the determination of Turner's guilt did not require that the judge accede to this request, but it ruled that his failure to do so necessitated the vacation of Turner's death sentence. Inasmuch as there is an undeniable risk that racial bias could have tainted Turner's conviction, this ruling must reflect a judgment that safeguarding the integrity of the capital sentencing process is more important than protecting defendants against racially-based discrimination.[325]

The decision to award a new sentencing hearing in *Turner* was premised largely on the broad discretion given the jury in a capital sentencing hearing and the "special seriousness of the risk of improper

320. 391 U.S. 510 (1968).

321. Adams v. Texas, 448 U.S. 38, 48 (1980). *See also* Krauss, *supra* note 281, at 541-44.

322. 476 U.S. 28 (1986).

323. *Id.* at 36-37.

324. *Id.* at 37.

325. Krauss, *supra* note 281, at 541-42 (footnote omitted).

sentencing in a capital case."[326] The same considerations underpin the Court's decisions in *Witherspoon*,[327] *Adams v. Texas*,[328] *Wainwright v. Witt*,[329] and, ipso facto, the District Court's decision in *Brown v. Rice*.[330]

In *Lockhart v. McCree*,[331] the Court again expressed the fundamental importance of the right to an impartial jury in a capital sentencing proceeding.[332] In *McCree*, the Court rejected the argument that "death qualification" created juries that were conviction prone and thus violated the right to an impartial jury during the guilt phase of a capital trial.[333] Writing for the Court, Justice (now Chief Justice) Rehnquist distinguished the special concerns reflected in *Witherspoon* regarding capital sentencing proceedings from McCree's claim of an unconstitutional conviction. "*Witherspoon* . . . dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury."[334] This statement, one year after the decision in *Wainwright v. Witt*, characterizes the Court's prohibition of the exclusion of sentencing jurors who have reservations about capital punishment. Rehnquist's statement also clearly reflects the Court's judgment that courts must take greater care to guarantee the "impartiality" of capital sentencing juries as opposed to juries employed to determine guilt or innocence, even of a capital offense. The Supreme Court's cases regarding juror exclusion in death penalty trials compel the conclusion that the *Batson* Court's prohibition against the unconstitutional abuse of peremptory challenges also prohibits the violation of a capital defendant's right to an impartial jury.

V. CONCLUSION

The importance of effective voir dire in empaneling an impartial sentencing jury in capital cases cannot be overemphasized. Essential to effective voir dire in capital cases is an understanding of the sixth and eighth amendment rights which may entitle a defendant to ask specific voir dire questions.

Juror misconceptions regarding life sentences and parole eligibility necessarily affect the sentencing recommendations. As a result, an effec-

326. *Turner*, 476 U.S. at 37.
327. 391 U.S. 510 (1968).
328. 448 U.S. 38 (1980).
329. 469 U.S. 810 (1985).
330. 693 F. Supp. 381 (W.D.N.C. 1988).
331. 476 U.S. 162 (1986).
332. *Id.* at 184.
333. *Id.* at 179-81.
334. *Id.* at 182.

tive voir dire must seek to elicit those misconceptions from prospective jurors. The "special circumstances" doctrine articulated in *Turner v. Murray*[335] provides a framework justifying a voir dire focusing on parole eligibility. Furthermore, a capital defendant should be allowed to introduce evidence regarding eligibility for parole, should a life sentence be granted, in order to mitigate a potential death sentence.

The sixth, eighth, and fourteenth amendments allow a defendant to use voir dire to discover jurors who have a bias against the consideration of mitigating factors. Otherwise, the defendant loses the opportunity to have the consideration of all reasons for imposing a sentence less than death.

Finally, the exclusion of scrupled jurors creates a jury partial to imposing the death penalty. Therefore, preventing the prosecutor from removing scrupled jurors through abuse of the peremptory challenge is a critical imperative.

The constitutional guarantees of due process of law, a fair trial, and freedom from cruel and unusual punishment arm the capital defendant with tools for the jury selection process. Inquiries during voir dire of a potential juror's misconceptions about parole eligibility, willingness to consider various mitigating evidence, and attitudes about capital punishment in general are prerequisites for the intelligent and effective use of challenges for cause and peremptory challenges. Through a rigorous and thoughtful voir dire, the search for the somewhat elusive fair and impartial capital sentencing jury can be conducted more successfully.

335. 478 U.S. 28 (1986).